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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

No. M:06-cv-01791-VRW

JOINT STATUS REPORT

This Document Relates Only To:

Chief Judge Vaughn R. Walker

*Center for Constitutional Rights, et al.
v. Barack Obama, et al. (07-cv-1115-VRW)*

By order dated January 20, 2010 (Dkt. 31), the Court directed the parties to submit a joint status report advising the court of the status of this case, what proceedings are necessary to resolve it, and proposing a tentative schedule for such proceedings, if applicable. By Order dated February 26, 2010 (Dkt. 34), the Court granted the parties until March 19, 2010 to submit this report.

The parties, through their undersigned counsel, hereby submit the following report

Joint Status Report

Center for Constitutional Rights, et al. v. Barack Obama, et al. (07-CV-1115-VRW) (M:06-CV-1791-VRW)

1 setting forth the background of this case and, as indicated, their respective positions on further
 2 proceedings.

3 **BACKGROUND**

4 1. This action was originally filed on January 17, 2006, in the United States District
 5 Court for the Southern District of New York. Plaintiffs' complaint alleges, *inter alia*, that
 6 plaintiffs were subject to warrantless surveillance by the National Security Agency ("NSA")
 7 under a program authorized by the President after the terrorist attacks of September 11, 2001.
 8 *See* Complaint (Dkt. 16-1).

9 2. In 2006, while the case was still before the Southern District of New York,
 10 plaintiffs moved for partial summary judgment. *See* Dkt. 16. Also in 2006, the Government
 11 Defendants moved to dismiss or, in the alternative, for summary judgment, based in part on an
 12 assertion of the state secrets privilege by the Director of National Intelligence ("DNI"). *See* Dkt.
 13 12. Judge Gerard Lynch of the Southern District of New York heard argument on these motions
 14 on September 5, 2006.

15 3. In February 2007, this case was transferred to this Court by the Judicial Panel on
 16 Multidistrict Litigation. *See* Dkt. 1. The parties thereafter submitted supplemental
 17 memorandum describing their pending motions. *See* Dkts. 3, 13, 14. This Court heard oral
 18 argument on the pending motions on August 9, 2007. *See* Dkt. 20.

19 4. On August 10, 2007, plaintiffs moved to supplement their original complaint (*see*
 20 Dkt. 19) to challenge provisions of the Protect America Act of 2007. The Government
 21 Defendants opposed that motion to supplement and continued to seek dismissal of this action.
 22 *See* Dkt. 22.

23 5. By order dated March 31, 2008, the Court terminated plaintiffs' motion to
 24 supplement with leave to petition to renew if the circumstances warranted. *See* Dkt. 438 (MDL-
 25 06-cv-1791-VRW). No further action has occurred in this case since that time.

1. **Plaintiffs' Position on Further Proceedings**

Plaintiffs' original complaint in this matter includes the following prayers for relief:

(b.) Order that Defendants disclose to Plaintiffs all unlawful surveillance of Plaintiffs' communications carried out pursuant to the program;

(c.) Order that all Defendants turn over to Plaintiffs all information and records in their possession relating to Plaintiffs that were acquired through the warrantless surveillance program or were the fruit of surveillance under the program, and subsequently destroy any such information and records in Defendants' possession;

Even assuming the NSA Program challenged in Plaintiffs' original summary judgment papers¹ is no longer in active operation with respect to continuing interception of communications, the relief set forth above is necessary to remedy the harms set forth in Plaintiffs' summary judgment papers. *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, Dkt. 16-1 (Dkt. 6 in Civil Action No. 06-313 (S.D.N.Y. March 9, 2006)) at 10-11 (describing professional imperative upon Plaintiffs in this case to "evaluate whether confidences may have been breached by Defendants' illegal surveillance and whether measures ought to be taken in response"); Plaintiffs' Opposition to Defendants' Motion to Dismiss, Dkt. 16-5 (Dkt. 56 in Civil Action No. 06-313 (S.D.N.Y. Jun. 30, 2006)) at 4-13 (further describing harms); Affirmation of Prof. Steven Gillers, Dkt. 16-6 (Jun. 27, 2006) at 10 ("Intercepted communications may be exploited to the disadvantage of clients with no one the wiser. ... [W]hether intercepted communications are or are not ever used to the disadvantage of a client or otherwise is irrelevant. CCR has a duty to protect its clients' secrets and confidences regardless of the use to which an interceptor may put the information. It is disclosure itself that is the evil against which lawyers must protect clients, regardless of any additional consequences of the disclosure"); Supplemental Affirmation of William Goodman, Dkt. 16-7 (June 30, 2006) at 10 (describing court order in *Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 40675 (E.D.N.Y. May 30, 2006),

¹ This Court has not ruled on the parties' summary judgment motions, which are described *supra* at ¶¶ 2-3.

1 compelling government's trial defense team and likely witnesses to disclose whether they had
 2 access to surveillance of attorney-client communications in that case).

3 This Court should therefore resolve the question of Plaintiffs' entitlement to such relief,
 4 and whatever additional relief the Court may find necessary to remedy the harms to Plaintiffs, on
 5 a renewed motion for summary judgment.

6 Given the Government's position, set forth below, that Plaintiffs' claims should be
 7 dismissed for lack of standing, Plaintiffs have no objection to proceeding by means of
 8 cross-summary judgment filings by the parties. That process was followed at earlier stages of
 9 this case and is consistent with the process the Court is currently following in *Al-Haramain*
 10 *Islamic Foundation, Inc. v. Obama* (C07-CV-109). Plaintiffs also do not object to the
 11 Government filing the initial brief, as long as the cross-motion schedule includes opportunity for
 12 a cross-reply brief by Plaintiffs. With the addition of a cross-reply, the timeline proposed by the
 13 Government for briefing is acceptable to Plaintiffs.

14 **2. The Government Defendants' Position on Further Proceedings**

15 Plaintiffs have alleged that they were subject to warrantless electronic surveillance under
 16 the so-called "Terrorist Surveillance Program" ("TSP"), pursuant to which the National Security
 17 Agency ("NSA") was authorized by then-President Bush after the 9/11 attacks to intercept
 18 certain international communications to or from the United States reasonably believed to involve
 19 a member or agent of al Qaeda or affiliated terrorist organizations. *See* Compl. (Dkt. 16-1)
 20 ¶¶ 26-27. Plaintiffs allege that, because clients they represent were accused of having terrorist
 21 connections, their communications may have been subject to interception under the TSP and that
 22 plaintiffs took steps to avoid such alleged surveillance. *See id.* ¶¶ 35-44. Based on that
 23 allegation of injury, plaintiffs originally sought to challenge the lawfulness of the TSP on
 24 statutory and constitutional grounds, and sought declaratory and injunctive relief—including as
 25 plaintiffs note for the disclosure and destruction of any records related to the alleged
 26 surveillance. *See id.* ¶¶ 45-52 & Prayer for Relief. In January 2007, the Government advised the
 27

1 Court that any electronic surveillance that had been occurring pursuant to the TSP had been
 2 supplanted by orders of the Foreign Intelligence Surveillance Court and that the TSP was not
 3 reauthorized thereafter. *See* Dkt. 127-1 in M:06-cv-1791-VRW.

4 As set forth above, Plaintiffs now seek to resume proceedings in this case by pressing one
 5 of their original claims—for the disclosure and expunction of any records that may exist of
 6 alleged surveillance of Plaintiffs under the now defunct Terrorist Surveillance Program.

7 From the outset of this case, the Government Defendants have sought dismissal on
 8 several grounds, including that Plaintiffs' allegations of injury are insufficient to establish their
 9 Article III standing. As we have previously set forth for the Court, Plaintiffs' allegation of TSP
 10 surveillance—and, thus, their allegation that documents purportedly exist of such alleged
 11 surveillance—has been and remains purely conjectural and insufficient to establish their
 12 standing. *See, e.g.*, Defendants' Supplemental Memorandum in Support of Motion to Dismiss or
 13 for Summary Judgment (Dkt. 3) at 12-15 and Defendants' Supplemental Reply Memorandum
 14 (Dkt. 14) at 6-17. Much like the *Jewel* and *Shubert* actions recently dismissed by the Court on
 15 January 21, 2010 (*see* Dkt. 703 in M:06-cv-1791-VRW), this case should also be dismissed for
 16 lack of standing based on the insufficiency of the Plaintiffs' allegations of injury. Accordingly,
 17 the Government will renew its motion to dismiss for lack of standing.

18 The Government's prior dispositive motion also sought summary judgment in the
 19 alternative based on an assertion of the state secrets privilege and related statutory privileges by
 20 the DNI over, *inter alia*, whether or not the Plaintiffs in fact have been subject to the alleged TSP
 21 surveillance. *See* Defs. Supp. Mem. (Dkt. 3) at 20-21; Defs. Supp. Reply (Dkt. 14) at 18-20. As
 22 in the *Jewel* and *Shubert* actions, the Government contends that the DNI's privilege assertion
 23 forecloses the disclosure of any evidence necessary to litigate Plaintiffs' standing and the merits
 24 of their remaining document claim, including any information that would tend to confirm or
 25 deny whether or not plaintiffs were subject to the alleged TSP surveillance and whether or not
 26 any documents concerning such alleged surveillance exist. Thus, even if the Court were inclined
 27

1 to find that Plaintiffs have alleged sufficient injury to proceed past the pleading stage, Plaintiffs' 2 standing or the merits of their claims could not otherwise be litigated without risking or requiring 3 the disclosure of privileged information.² However, in light of the Court's dismissal of *Jewel* 4 and *Shubert* without reaching the state secrets privilege issue, the Court can and should likewise 5 dismiss this case for lack of standing again without reaching the impact of the Government's 6 privilege assertion.

7 With respect to the sequence of further proceedings, the parties agree generally on a 8 schedule (*see* Part 3 *infra*), but differ on whether the Court should now consider cross-motions. 9 Government submits that the proper course would be for the Court to consider its dispositive 10 motion before consideration of summary judgment on the merits of the Plaintiffs' last remaining 11 document claim. Plaintiffs' document claim is premised on their original allegation that they 12 were subject to and injured by the TSP. The insufficiency of that allegation to establish standing 13 impacts all claims—including the claim that documents of such alleged surveillance exist—and 14 thus is properly subject to a motion to dismiss. Likewise, because the underlying facts needed to 15 address plaintiffs' standing and claim on the merits at the summary judgment stage are subject to 16 the Government's privilege assertion, the Government could not respond otherwise to Plaintiffs' 17 summary judgment motion until after the issues raised by the Government's motion are resolved. 18 The process proposed by the Government would be consistent with the process followed by the 19 Court in the *Shubert* action. *See* Dkt. 31 in 07-cv-00693-VRW (minute order following case 20 management conference in *Shubert* setting schedule on Government's dispositive motion). The 21

22 ² The Government notes that, in a FOIA action seeking information essentially identical 23 to that at issue in this privilege assertion—whether attorneys for CCR have been subject to 24 alleged surveillance—the Court of Appeals for the Second Circuit recently upheld the 25 Government's refusal to confirm or deny that information. *Wilner, et al. v. National Security* 26 *Agency*, 592 F.3d 60 (2d Cir. 2009). The Government reserves for our motion discussion of 27 whether plaintiffs have stated a valid cause of action to compel the disclosure of records 28 allegedly held by the Government or which would authorize the destruction of any such records.

1 status of this case is not comparable to the lengthy proceedings that have arisen in the *Al-*
 2 *Haramain* action and led to the Court's consideration of cross-summary judgment motions in
 3 that case.

4 **3. Proposed Schedule**

5 With the exception of whether cross-motions should be filed (discussed above), the
 6 parties agree generally on a schedule for further proceedings.

7 The Government Defendants propose the following schedule: (i) that the Government
 8 Defendants renew their dispositive motion by no later than April 28, 2010; (ii) that Plaintiffs
 9 filed an opposition to that motion by May 28, 2010; (iii) that the Government Defendants reply
 10 by June 18, 2010; and (iv) that the Court determine if and when it wishes to set the matter for a
 11 hearing thereafter.

12 As noted above, the Plaintiffs do not object to this schedule with the addition of a cross-
 13 reply in connection with their own summary judgment motion.

14 Respectfully Submitted,

<u>For Government Defendants' Position</u>	<u>For Plaintiffs' Position</u>
<p>16 MICHAEL F. HERTZ 17 Deputy Assistant Attorney General 18 JOSEPH H. HUNT 19 Director, Federal Programs Branch 20 VINCENT M. GARVEY 21 Deputy Branch Director 22 ANTHONY J. COPPOLINO 23 Special Litigation Counsel tony.coppolino@usdoj.gov 24 U.S. Department of Justice, Civil Division 25 Massachusetts Avenue, N.W. Washington, D.C. 20001 Phone: (202) 514-4782</p> <p>By: <u>s/ Anthony J. Coppolino</u> ANTHONY J. COPPOLINO</p> <p>Attorneys for Defendants</p>	<p>Shayana Kadidal Michael Ratner CENTER FOR CONSTITUTIONAL RIGHTS 666 Broadway, 7th Floor New York, NY 10012-2317 (212) 614-6438 Email: kadidal@ccrjustice.org</p> <p>By: <u>s/ Shayana Kadidal</u> SHAYANA KADIDAL</p> <p>Attorneys for Plaintiffs</p>

1 **DECLARATION PURSUANT TO GENERAL ORDER 45, § X.B**

2 I, ANTHONY J. COPPOLINO, hereby declare pursuant to General Order 45, § X.B, that
3 I have obtained the concurrence in the filing of this document from the other signatory listed
4 below.

5 I declare under penalty of perjury that the foregoing declaration is true and correct.

6 Executed on March 19, 2010, in the City of Washington, D.C.

7
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